

1937

Present : Maartensz J.

SANTIAGO v SANTIAGO.

657—P. C. Jaffna, 8,062.

*Maintenance—Resumption of cohabitation—Order for maintenance not cancelled—Wife's claim for arrears of maintenance.*

An order for maintenance is not cancelled by the resumption of cohabitation, and a wife is entitled to recover arrears of maintenance for a period during which the husband lived with her.

*Kadiravail Wadivel v. Sandanam* (30 N. L. R. 351) followed.

**A**N appeal from an order of the Police Magistrate of Jaffna.

The appellant was ordered to pay the respondent, his wife, maintenance at the rate of Rs. 30 per month. The appellant subsequently returned to his wife and lived with her from February to November, 1936. The wife claimed arrears of maintenance for the months of February, March, April and May, during which the appellant lived with her.

Her application was allowed.

*H. W. Thambiah* (with him *C. Renganathan*), for appellant.—The parties lived together after the order for maintenance. The legal consequence is that the order becomes void and inoperative. Vide *Sohoni* (13th ed.) p. 1047, where the wife returns to the husband subsequent to the order, the order becomes ineffectual subsequent to the date of such return. (1888) *All. (W. N.)*. 217. If parties separate again, a fresh application for maintenance should be made. No claim for maintenance can be made for a period parties lived together. Section 10 of the Ordinance says that if there is change of circumstances an order may be varied. But change of circumstances has been interpreted to be change of pecuniary circumstances. (1889) *Koch* 24. Hence when parties live together the husband cannot make an application to have the order cancelled or varied under section 10 or any other section. Many circumstances make a maintenance order void; for instance, death, insolvency, lunacy of the husband. Even if the order does not become void, if it is in evidence that the husband supported the wife then such support should be taken to be in lieu of the order for maintenance. Where the wife supports the husband as in this

case there is an implied waiver of her claim and she cannot be allowed to set it up later. A wife cannot claim past maintenance (*Ranasinghe v. Peiris*<sup>1</sup>)

*N. Kumarasingham* (with him *P. Navaratna Rajah*), for applicant, respondent.—Our Maintenance Ordinance is self-contained, and once an order for maintenance is made under section 3 the only way in which the order can be cancelled is indicated in section 6. See *Kadiravail Wadivel v. Sandanam*.<sup>2</sup> There is no provision of the law by which the order becomes inoperative by the parties living together. The legislature has not made any such provision. In England by the Summary Jurisdiction Separation and Maintenance Act of 1925, section 2 (2), there is provision for a cessor of the order for maintenance on the resumption of cohabitation. In India the law applicable is not the same as ours. There is direct local authority for the proposition that the order for the payment of maintenance is not cancelled by the resumption of cohabitation. See *Kadiravail Wadivel v. Sandanam* (*supra*). As long as there is a finding of fact that for a period parties lived together the husband did not maintain the wife, the wife is entitled to recover arrears of maintenance. If parties wanted to have the order set aside on their resumption of cohabitation they could have made a joint application. They have not done so.

*Cur. adv. vult.*

November 1, 1937. MAARTENSZ J.—

The appellant in this case was in August, 1935, ordered to pay the respondent, his wife, Rs. 30 a month for her maintenance. The payments were to be made from September 1, 1935.

The appellant subsequently returned to his wife and lived with her from February to November, 1936.

The questions for decision in this appeal are :—

- (1) Whether the appellant paid his wife maintenance for the months of February, March, April and May ;
- (2) Whether he is in any event not liable to pay her maintenance because he was living with his wife during that period.

The first question is one of fact and I am not prepared to dissent from the finding of the Magistrate that maintenance was not paid during the months in question.

The appellant's contention on the second question is that the order directing him to pay his wife maintenance was impliedly annulled by his resuming cohabitation with her. In support of this contention I was referred to a passage in *Sohoni's* commentary on the sections relating to maintenance in the Indian Criminal Procedure Code. The authority cited by *Sohoni* is not available and I am not prepared to adopt this statement of the law without examining the authority.

There is direct authority to the contrary in the Ceylon case of *Kadiravail Wadivel v. Sandanam*<sup>2</sup>. In that case a married woman obtained an order for maintenance against her husband. Thereafter the parties came before the Court and it was recorded that they were living together. They separated again and the wife applied for the enforcement of the order for

<sup>1</sup> 13 N. L. R. 21

<sup>2</sup> (1929) 30 N. L. R. 351.

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maintenance in her favour. The husband contended that because he and his wife had lived together the order directing him to pay maintenance had been cancelled.

It was held that the order for the payment of maintenance had not been cancelled by the resumption of cohabitation. I respectfully agree with the *ratio decidendi* in that case and follow it.

I accordingly hold that the order directing the appellant to pay maintenance is still in force and I dismiss the appeal with costs.

*Affirmed.*

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